

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LARRY WILMER,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. N15C-08-082 CEB
)	
OCWEN FINANCIAL CORP.,)	
)	
Defendant.)	

Date Submitted: February 17, 2017
Date Decided: May 31, 2017

OPINION.

Plaintiff's Motions to Amend.

DENIED.

Defendant's Motion to Dismiss.

GRANTED.

Larry Wilmer, *Pro Se Plaintiff.*

David A. Dorey, Esquire, Blank Rome, LLP, Wilmington, Delaware. Attorney for Defendant.

BUTLER, J.

FACTS

This case involves a property located at 28 W. 39th Street, Wilmington, DE 19802 (the “Property”). The Property is encumbered by a mortgage which a former owner, Mary E. Seth, executed on July 20, 2005 to Ameriquest Mortgage Company. The mortgage was subsequently assigned to Deutsche Bank National Trust Company and later turned over to Ocwen Financial Corporation for collections when Ms. Seth defaulted on the mortgage in July 2011.

The property was scheduled to be sold at a tax sale to satisfy the outstanding mortgage. Plaintiff Larry Wilmer, however, purchased the Property from Ms. Seth in July 2015 before the tax sale took place. Wilmer sought to assume the mortgage at the time of purchase. After speaking with an Ocwen representative via telephone, Wilmer alleges that it was his understanding that Ocwen would allow him to assume the loan and he therefore went through with the purchase of the Property.¹ Title was transferred by quitclaim deed after Wilmer paid all outstanding taxes. The title was thus conveyed subject to the Ocwen mortgage. In his Complaint, Wilmer alleged that he would face foreclosure if he did not pay a balloon payment of \$52,000 by August 31, 2015. But this is not a suit seeking to stave off foreclosure. Rather, Wilmer seeks to void Ocwen’s mortgage interest by

¹ Whether Wilmer believed he successfully assumed the mortgage as a result of the phone call is at best uncertain. In his Complaint, Wilmer alleges that the representative told him assumption could be accomplished by letter request. The language of the letter Wilmer sent to Ocwen suggests that he was aware that the assumption had not yet been approved: Wilmer specifically requested “a decision as to whether your company will allow the loan to be assumed.”

declaratory judgment. Indeed, Ocwen has thus far not initiated foreclosure on the Property.

Wilmer has filed Declaratory Judgment complaint, seeking a finding that the mortgage at issue is unenforceable. Wilmer raises two claims. First, he says that the mortgage is an unenforceable “predatory loan.” Second, he argues that the statute of limitations for foreclosure has elapsed.

Presently before the Court are Ocwen’s Motion to Dismiss and Wilmer’s Motions to Amend Complaint.² Wilmer seeks to amend his Complaint to include claims of waiver and fraudulent inducement and to join Ms. Seth as a plaintiff. Ocwen has moved to dismiss Wilmer’s claims for failure to state a claim upon which relief can be granted, and opposes Wilmer’s Motions to Amend as futile.

STANDARD OF REVIEW

It is well established that leave to amend under Superior Court Rule 15(a) should be freely granted “when justice so requires.”³ A motion to amend must be

² To clarify the procedural history in this matter, Ocwen filed its Motion to Dismiss with a supporting brief on September 15, 2015. The supporting brief was filed without the Court’s permission and therefore rejected. However, Wilmer, who is representing himself *pro se*, received the rejected brief by mail and filed his Response with a Motion to Amend on September 26, 2015. Pursuant to a briefing schedule issued by the Court, Ocwen properly filed its supporting brief, which also addressed Wilmer’s Motion to Amend, on October 2, 2015. Wilmer subsequently filed a second Motion to Amend the Complaint to join Mary E. Seth as a plaintiff, which Ocwen opposes.

³ Super. Ct. Civ. R. 15(a).

denied, however, if the amended complaint would not survive a motion to dismiss.⁴ The standard for addressing the legal sufficiency of a proposed amended complaint is the same standard applicable to a motion to dismiss under Rule 12(b)(6).⁵

A motion to dismiss pursuant to Superior Court Rule 12(b)(6) will not be granted if the plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.⁶ All well-pled allegations in the complaint must be accepted as true,⁷ and every reasonable factual inference will be drawn in favor of the plaintiff.⁸ Dismissal is appropriate where the plaintiff failed to plead facts supporting an element of the claim, or under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.⁹

DISCUSSION

A. Wilmer lacks standing.

Preliminarily, Ocwen contends that Wilmer lacks standing to bring claims

⁴ *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 2008 WL 555919, at *1 (Del. Super. Feb 29, 2008).

⁵ *Id.*

⁶ *Martin v. Widener Univ. Sch. of Law*, 1992 WL 153540, at *2 (Del. Super. Ct. June 4, 1992) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

⁷ *Id.* (citing *American Ins. Co. v. Material Transit, Inc.*, 446 A.2d 1101, 1102 (Del. Super. 1982)).

⁸ *Master Mech. Inc. v. Shoal Constr., Inc.*, 2009 WL 1515591, at *1 (Del. Super. May 29, 2009).

⁹ *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super. Aug. 20, 2004).

related to a mortgage to which he is not a party. Under Delaware law, a person must either be a party to a contract or an intended third party beneficiary of a contract to have standing to enforce any rights under the contract.¹⁰ The underlying mortgage is a contract between Ameriquest Mortgage Company and Ms. Seth; Wilmer's name does not appear anywhere in the document. Because Wilmer is not a party to the mortgage, he lacks standing to advance claims related to it.

Perhaps in an effort to cure his lack of standing, Wilmer has moved to amend his Complaint to join Ms. Seth as a plaintiff. But because each of Wilmer's claims fails on the merits, joining Ms. Seth as a plaintiff would be futile and the Court denies Wilmer's request to do so.

B. Delaware does not recognize a cause of action for predatory lending.

Assuming *arguendo* that Wilmer has standing to challenge enforcement of the mortgage, he fails to identify any cause of action for predatory lending in Delaware. Moreover, Wilmer makes conclusory allegations that the loan is predatory and racially discriminatory. The allegations are insufficient to raise a

¹⁰ *CitiMortgage, Inc. v. Bishop*, 2013 WL 1143670, at *4 (Del. Super. Mar. 4, 2013).

right to relief for predatory lending.¹¹ Accordingly, Wilmer's claim for relief based on predatory lending must be dismissed.

C. The statute of limitations for Ocwen to bring a foreclosure action has not elapsed.

Wilmer claims that Ocwen is barred from foreclosing on the mortgage because it failed to bring a foreclosure action within the applicable statute of limitations. To this end, Wilmer contends that the applicable statute of limitations is three years. Ocwen argues that the applicable statute of limitations is 20 years because the mortgage was signed under seal and thus does not bar Ocwen from enforcing the mortgage.

Generally, causes of action based upon contracts must be brought within 3 years of a breach.¹² Contracts under seal, however, are subject to a twenty-year statute of limitations.¹³ In Delaware, "the presence of the word 'seal' next to an individual's signature is all that is necessary to create a sealed instrument."¹⁴

Ms. Seth's signature on the mortgage is clearly accompanied by the word

¹¹ *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) ("A trial court is not . . . required to accept as true conclusory allegations 'without specific supporting factual allegations.'"); *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000) ("Where allegations are merely conclusory. . . (i.e., without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss.").

¹² 10 Del. C. § 8106.

¹³ *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 10 (Del. 2009) (citing *Aronow Roofing Co. v. Gilbane Bldg. Co.*, 902 F.2d 1127, 1129 (3d Cir. 1990)).

¹⁴ *Id.* at 14.

“seal.” Thus, the mortgage is a contract under seal and is subject to a twenty-year statute of limitations. Assuming the statute of limitations began to run when the mortgage allegedly went into default in 2011, twenty years have not elapsed and the mortgage is still enforceable. Because Wilmer cannot succeed on this claim under any reasonably conceivable set of facts, his claim as to the statute of limitations is dismissed.

D. Ocwen has not waived its rights in the mortgage.

Wilmer seeks to amend his Complaint to include a claim that Ocwen waived its interest in the Property when it failed to intervene in the scheduled tax sale of the property. “Waiver is the voluntary and intentional relinquishment of a known right.”¹⁵ Three elements must be established before a conclusion of waiver may be reached: (1) there is a requirement or condition to be waived; (2) the waiving party must know of the requirement or condition; and (3) the waiving party must intend to waive that requirement or condition.¹⁶

Here, Wilmer fails to allege any facts that Ocwen intentionally waived its rights under the mortgage. Moreover, a property sold at tax sale may be redeemed within 60 days of the sale.¹⁷ Wilmer cannot establish that Ocwen intentionally

¹⁵ *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).

¹⁶ *Id.*

¹⁷ 9 Del. C. § 8729.

waived its rights by failing to redeem the property before the sale occurred, since it would have had the opportunity to do so for 60 days following the date of the sale. Accordingly, the Court denies Wilmer's Motion to Amend as to this claim.

E. Wilmer cannot establish the elements necessary to proceed with a claim for fraudulent inducement.

Wilmer also seeks to amend his Complaint to include a claim for fraudulent inducement. Wilmer alleges that Ocwen, by representing that Wilmer could assume the loan, fraudulently induced Wilmer to spend \$12,000 for owed taxes on the property, transfer taxes, and renovations. Wilmer requests a finding that the amount he paid in reliance on Ocwen's representation constitutes a lien against the property in Wilmer's favor.

In his Complaint Wilmer states simply that he spoke with an Ocwen representative who informed him that a loan assumption could be acquired by an appropriate letter request. Wilmer mailed a letter requesting a loan assumption as directed by Ocwen. Wilmer does not allege that Ocwen falsely informed him that the loan assumption was approved. Consequently, Wilmer is unable to establish a claim for fraudulent inducement and his Motion to Amend as to this claim is denied.

CONCLUSION

Because each of Wilmer's claims (both asserted and proposed) fail on the merits, Wilmer's Motions to Amend are **DENIED** and Ocwen's Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.



Judge Charles E. Butler